

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 76 OF 2020

The State of Maharashtra,
Through Police Inspector,
Police Station Pachod,
Tq. Pachod, Dist. Aurangabad

... Applicant
(Orig. Prosecution)

Versus

Raoji Bandu Pawar,
Age : 45 years, Occu. : Labour,
R/o. Chikhali, Tq. Badnapur,
Dist. Jalna.

... Respondent
(Orig. accused)

...
Mr. R. D. Sanap, APP for Applicant - State

...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATED : 12th JUNE, 2023

ORDER (PER ABHAY S. WAGHWASE, J.) :

1. By way of instant application State is seeking leave to challenge judgment and order passed by learned Special Judge-3, (under POCSO Act), Aurangabad in Special POCSO Case No.15 of 2015, dated 04.04.2019 by which accused Raoji, respondent herein has been acquitted from charges under section 363, 366-A and 376 of Indian Penal Code (IPC) along with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012).

GIST OF PROSECUTION CASE IN TRIAL COURT

2. Mother of a victim aged 13 lodged report alleging that on 16.04.2014, she and her husband went for agriculture work and their daughter victim was alone in the house. When victim went to fetch water, accused who came on motorcycle, kidnapped her on false assurance of marriage. Informant mother, when came home, did not find her daughter and so inquiry was made and at such time, she learnt from her sister-in-law Bababai that accused had come to their house at 2.30 p.m. and he had taken victim on motorcycle. She approached Pachod police station and lodged report against accused. After five months, a girl was traced and brought by police and therefore, she narrated report (Exh.26).

3. After investigation accused were charge-sheeted and tried by Special Court, during which prosecution examined 8 witnesses and relied on documentary evidence. After appreciating both oral and documentary evidence, learned trial Judge by judgment and order dated 04.04.2019 acquitted the accused from all the charges.

Hence, the said Judgment is now proposed to be challenged by prosecution and to do so leave is sought by instant application.

4. Learned APP would strenuously submit that offence is serious. Prosecution had established testimony of in all 8 witnesses including that of victim girl (PW-3). Medical evidence had supported prosecution version. Therefore, it is submitted that a full proof case was made out. It is emphasized that in cases of such nature, sole testimony of victim is crucial and the same here inspire confidence. Her evidence and evidence of mother-informant has not been shaken. Victim was proved to be a minor. Memorandum at the instance of accused established his involvement. Medical evidence is also supportive and therefore, prosecution had established their case firmly and cogently, but the same has not been accepted by the learned trial Judge and there is erroneous approach in appreciating crucial evidence and failure to apply correct law. Therefore, it is submitted that such judgment cannot be allowed to be sustained and hence leave to question the said judgment is prayed for.

5. We have heard learned APP at length and have carefully examined the evidence placed on record before the trial Court.

In the light of charge of POCSO Act, it is first to be seen that whether victim is shown to be a minor as required under section 2(d) of the POCSO Act.

6. To ascertain the age, testimony of informant-mother assumes importance. However, it has come in her evidence that she is unable to give exact date of birth of her daughter. It appears that, she has admitted that herself was married at age of 16 and she was already married 40 years back and she seems to have admitted that her first child was born after a year also after her marriage and thereafter every one year she gave birth to other children including victim.

7. Occurrence allegedly took place in 2014, going by this computation from the evidence of PW-1 Kaushallya, mother it *prima facie* appears that victim could be around 18 years of age. But victim herself gave her age between 14 to 16. In cross, she seems to have answered that she was already married 3 years back and at the time of evidence she had a child and she was again pregnant. She also admitted that her brother and sisters are having children. There is no birth certificate nor school record in support of birth certificate. Though prosecution by examining PW-6 Dr. Seemakhan, doctor brought on record the age of victim to be 14 to 16 years, it seems that unfortunately, except placing document on record the Radiologist who conducted the Ossification test has not been examined to prove the Radiologist report or opinion about it. It is settled law that, there is always margin of

two years in the age determined by medical mode. Taking into consideration above discussion, it seems that there being no positive evidence about age, it can not be for sure said that victim was a minor at the time of incident. Now, let us see the other evidence regarding sections 363 and 376 of IPC.

8. From the very evidence of victim (PW-3), her mother (PW-1) and PW-2 Bababai, it is emerging that, accused was already a married person and had children and also happens to be a distant relative. Informant-mother was out for work on that relevant day and when she returned home, she did not find victim daughter in the house. She claims to have made inquiry with PW-2 Bababai and learnt that daughter was in the company of accused. PW-3 victim in her testimony stated that for three days she and accused stayed in his land and there while having intercourse accused slapped her. Her evidence shows that from there they went to Dhamangaon and stayed there for three months. According to her, there also during such period there was forceful intercourse on every day and after which she shifted to Pandharpur and that later on he was brought to Pachod Police Station. However, her lengthy cross goes to show that she tried to raise hue and cry, alight from the motorcycle, but according to her there was no one around. She spoke about attempt being made to run away, whenever she went

for answering call of nature. She has admitted that since leaving village till she returned, she made no phone calls to anyone. She has also not availed the opportunity of informing Pralhad Rathod, who supplied meals. Resultantly, in spite of several opportunities, she did not escape and therefore, seems to be deposing against accused only in the witness box. It is also pertinent to note except stating that while having intercourse, she was slapped, she does not speak about any forceful sexual intercourse with her. Even C.A. reports are said to be inconclusive, more particularly, report (Exh.61, 90 and 91).

9. Therefore, on taking survey of evidence on behalf of prosecution, there is no legally acceptable proof about victim to be a minor. On the contrary, on the date of evidence she is already a mother of a child. Her evidence shows that she had alleged that by brandishing knife accused threatened her and made her sit on his motorcycle. But her own relative Bababai spoke about girl going along with accused. She does not speak about forcibly taken nor about victim raised hue and cry while passing through house of Bababai. Under such circumstance, the allegation of forcibly taken cannot be accepted. Moreover, she had stayed with accused for a considerably long time and had opportunities, however she did not make her escape good. She appears to be quite aware about

previous marriage of accused and in spite of that without resistance she has accompanied accused and stayed with him at various places. Therefore, necessary ingredients for attracting sections 376, 366-A and 363 of IPC are patently missing. Therefore, as none of the ingredients for any of the charge are cogently proved by prosecution, we do not consider any infirmity in the judgment and order impugned herein. Available material has been scrutinized by the learned trial Judge by keeping in mind the legal requirements and only on proper assessment case of prosecution has been disbelieved. Therefore, we do not consider it a fit case to interfere or to overturn the findings. Hence, application for leave to appeal by State is dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)